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COVA, ANDREW VERGARA JR., DONALD SCHWARTZER, HORACE
FRANK, KEVIN MONTGOMERY, LARRY GUILLEN and RONALD CRUMP

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31 UNITED STATES DISTRICT COURT
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33 CENTRAL DISTRICT OF CALIFORNIA
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36 NADINE HAYS,) Case No. CV12-10219 DMG(PJW)
37 Plaintiff,)
38 vs.) DEFENDANTS' OPPOSITION
39 LOS ANGELES POLICE) TO PLAINTIFF'S MOTION
40 DEPARTMENT, et al.,) FOR HER TO BE ALLOWED
41 Defendants.) TO RECORD
42) CONVERSATIONS WITH
43) DEFENSE COUNSELS
44) WITHOUT THE CONSTANT
45) THREAT OF BEING
46) PROSECUTED FOR A
47) FELONY CRIME;
48) DEFENDANTS' REQUEST FOR
49) SANCTIONS AGAINST
50) PLAINTIFF IN THE AMOUNT
51) OF \$1,975

1)
 2) Accompanying Papers:
 3) Declaration of Lisa K. Garner
 4)
 4) Complaint filed: November 29,
 4) 2012
 4) Discovery Cut-off: May 5, 2014

5 **I. INTRODUCTION**

6 Defendants LOS ANGELES POLICE DEPARTMENT, ALEX VARGAS,
 7 JAVIER NAVARRO, JORGE RODRIGUEZ, PETE ECHAVARRIA, MICHAEL
 8 BRAUSAM, DERRICK PRUDE, DERRICK DOMINGUEZ, JASON DE LA
 9 COVA, ANDREW VERGARA JR., DONALD SCHWARTZER, HORACE
 10 FRANK, KEVIN MONTGOMERY, LARRY GUILLEN AND RONALD
 11 CRUMP (“City Defendants”) and ROBERT TAYLOR (“Taylor”) (City
 12 Defendants and Taylor are collectively referred to herein as “Defendants”) hereby
 13 oppose Plaintiff NADINE HAY’s (“Plaintiff”) Motion for Her to be Allowed to
 14 Record Conversations With Defense Counsels Without the Constant Threat of
 15 Being Prosecuted for a Felony Crime (“Motion”).

16 This lawsuit arises from Plaintiff’s belief that her arrest on April 25, 2012 by
 17 the Los Angeles Police Department violated her civil rights. In addition to various
 18 City Defendants, she has included a private security guard, Defendant Taylor.

19 Despite this Court explaining to Plaintiff on May 15, 2014 at the hearing on
 20 Defendants’ Motion to Compel Plaintiff’s Independent Psychiatric Examination
 21 (“Motion to Compel IME”) that Defendants did not have to consent to being audio
 22 recorded, Plaintiff filed the instant frivolous Motion with the Court that same day.

23 As this Motion is frivolous and is utterly without merit, sanctions against
 24 Plaintiff in the amount of \$1,975 should be granted to Defendants.

25 **II. RELEVANT FACTS**

26 On April 11, 2014, the parties attempted to participate in a telephone
 27 conference during which Plaintiff insisted on recording the conversation. Counsel
 28 for Defendants would not consent to be recording which resulted in Plaintiff

1 hanging up and refusing to participate. Declaration of Lisa K. Garner in Support
 2 of Defendants' Opposition ("Garner Decl.") at ¶ 2, Ex. A.

3 On April 15, 2014, Plaintiff emailed Defendants' counsel asking them to
 4 sign a Stipulation regarding audio recordings of conversations and stated that if she
 5 did not hear back by from counsel, she would assume that counsel approved of
 6 such. Garner Decl. at ¶ 3, Ex. B. On April 17, 2014, counsel for Defendant
 7 Taylor responded that she did not approve or agree to this stipulation. *Id.*

8 On May 8, 2014, Plaintiff emailed Defendants' counsel stating that she
 9 would be writing a request to the court regarding recording conversations and
 10 asked counsel to send her an explanation why counsel was not agreeable to
 11 Plaintiff audio recording their conversations. See Court Doc. No. 74, Ex. F. On
 12 May 9, 2014, counsel for Defendant Taylor responded explaining that counsel
 13 would not agree to being recorded. *Id.* Counsel repeated to Plaintiff that it is a
 14 felony to record a conversation in California without the consent of the parties and
 15 that counsel for Defendant Taylor would not consent. *Id.* Counsel for Defendant
 16 Taylor explained that Plaintiff was welcome to take written notes and to
 17 memorialize conversations in writing after they happen. *Id.* Also on May 9, 2014,
 18 counsel for City Defendants responded stating she would not consent to being
 19 recorded. *Id.* Counsel explained she had previously told Plaintiff that California is
 20 a state that requires consent of all parties to a recording and that failure to notify
 21 the other party and get their consent is a crime. *Id.* Counsel further explained that
 22 there were other ways for her to memorialize conversations, such as notes and
 23 journals. *Id.*

24 On May 15, 2014, this Court explained to Plaintiff at the hearing on
 25 Defendants' Motion to Compel Plaintiff's Independent Psychiatric Examination
 26 that the Court could not order Defendants' counsel to consent to being audio
 27 recorded. Garner Decl. at ¶ 4. Despite this, Plaintiff filed the instant frivolous
 28 Motion with the Court that same day.

1 On May 22, 2014, Plaintiff sent Defendants' counsel and Detective Purcell
 2 an email that she described as her "CEASE AND DESIST order" stating that the
 3 email was their notice that anytime they speak to her or are around her, she may be
 4 recorded. Garner Decl. at ¶ 5, Ex. C.

5 **III. LEGAL ARGUMENT**

6 **A. California Penal Code Section 632, Et Seq. Makes It Is A Crime**
 7 **To Record Without Consent**

8 In California, it is a crime to record a conversation without consent. Section
 9 632 of the California Penal Code states:

10 Every person who, *intentionally and without the consent of all*
 11 *parties* to a confidential communication, by means of any electronic
 12 amplifying or recording device, eavesdrops upon or records the
 13 confidential communication, whether the communication is carried on
 14 among the parties in the presence of one another or by means of a
 15 telegraph, telephone, or other device, except a radio, shall be punished
 16 by a fine not exceeding two thousand five hundred dollars (\$2,500), or
 17 *imprisonment in the county jail not exceeding one year, or in the*
 18 *state prison, or by both that fine and imprisonment*. If the person has
 19 previously been convicted of a violation of this section or Section 631,
 20 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not
 21 exceeding ten thousand dollars (\$10,000), by imprisonment in the
 22 county jail not exceeding one year, or in the state prison, or by both
 23 that fine and imprisonment.

24 Cal. Penal Code § 632(a) (emphasis added). Section 632(c) defines a "confidential
 25 communication" as one that is "carried on in circumstances as may reasonably
 26 indicate that any party to the communication desires it to be confined to the parties
 27 thereto, but excludes a communication made ... in any other circumstance in which
 28 the parties to the communication may reasonably expect that the communication
 may be overheard or recorded."

29 Section 637 of the California Penal Code prohibits the surreptitious
 30 recording of "confidential communications" by any party to a telephone call, as
 31 well as by any third parties. Specifically, the section provides that all parties to a
 32 telephone conversation must be informed of or consent to the recording of the
 33 conversation.

1 Here, as detailed above, Defendants' counsel has on numerous occasions
 2 explained to Plaintiff that they will not consent to being recorded and explained to
 3 Plaintiff that it is a crime to record a conversation without their consent. Plaintiff
 4 has not cited to, and Defendants' counsel cannot find, any statute or case law that
 5 states there is an exception to the consent requirement of California Penal Code
 6 section 632 *et seq.* if the one of the parties has a disability, as Plaintiff allegedly
 7 has. Furthermore, California Penal Code section 632 *et seq.* does not allow a party
 8 to get around the consent requirement by putting the other party on notice that they
 9 are being recorded as Plaintiff is attempting to do in her May 22, 2014 email.
 10 Accordingly, Defendants respectfully request that this Court not only deny
 11 Plaintiff's Motion but also issue an Order that Plaintiff cannot record Defendants
 12 or Defendants' counsel without their express consent.

13 **B. Plaintiff's Motion Should Be Stricken Due To Her Failure To**
 14 **Give Enough Notice**

15 Plaintiff's Motion is untimely and should be stricken. Regarding Notice and
 16 Service of the Motion, the Central District of California's Local Civil Rules state:

17 The notice of motion shall be filed with the Clerk not later than
 18 twenty-eight (28) days before the date set for hearing, and shall be
 19 served on each of the parties electronically or, if excepted from
 20 electronic filing, either by deposit in the mail or by personal service.
 21 *If mailed, the notice of motion shall be served not later than thirty-one (31) days before the Motion Day designated in the notice.* If
 22 served personally, or electronically, the notice of motion shall be
 23 served not later than twenty-eight (28) days before the Motion
 24 Day designated in the notice.

25 L.R. 6-1 (emphasis added).

26 Plaintiff's husband John Hay's Proof of Service states that he served a copy
 27 of the Motion via U.S. Mail on May 13, 2014. The envelope, however, shows it
 28 was mailed on May 14, 2014. Garner Decl. at ¶ 6, Ex. D. Furthermore, it is
 29 unlikely the Motion was served on May 13, 2014, when Plaintiff signed the Motion
 30 and her declaration on May 14, 2014, *the day after* it was allegedly mail served.
 31 Therefore, Plaintiff served the Notice of Motion less than the thirty-one (31) day

1 requirement. Since the Motion was untimely served, Plaintiff's Motion should be
2 stricken.

3 **C. Plaintiff Should Be Sanctioned For Filing This Frivolous Motion**
4 **In Complete Disregard Of This Court and on an Untimely Basis**

5 Local Rule 11-9 states, "The presentation to the Court of frivolous motions .
6 . . subjects the offender at the discretion of the Court to sanctions of L.R. 83-7."
7 Despite this Court explaining to Plaintiff that she cannot record without the parties'
8 consent at the hearing on May 15, 2014 and informed Plaintiff the Court could not
9 order Defendants' counsel to consent, and despite Defendants' counsel repeatedly
10 informing Plaintiff that they would not consent to being recorded, Plaintiff
11 disregarded this Court and filed the instant frivolous Motion that very same day
12 and has not withdrawn the Motion. Therefore, Defendants respectfully request that
13 this Court sanction Plaintiff for her complete disregard for this Court's prior ruling
14 and filing of this frivolous Motion pursuant to Local Rule 11-9.

15 **IV. CONCLUSION**

16 Pursuant to the foregoing facts and law, Defendants respectfully request that
17 this Court deny Plaintiff's Motion for Her to be Allowed to Record Conversations
18 With Defense Counsels Without the Constant Threat of Being Prosecuted for a
19 Felony Crime. Furthermore, since Plaintiff filed this frivolous Motion in complete
20 disregarded of this Court's prior ruling, Defendants respectfully request the Court
21 sanction Plaintiff in the amount of \$1,975.

22 Dated: May 23, 2014

GORDON & REES, LLP

23
24 By: s/ Lisa K. Garner
25 Debra Ellwood Meppen
26 Lisa K. Garner
27 Hilary E. Feybush
28 Attorneys for Defendant
ROBERT TAYLOR

1 Dated: May 23, 2014

CITY ATTORNEY

2 By: s/ Elizabeth L. Greenwood

3 Michael N. Feuer

4 James P. Clark

5 Cory M. Brente

6 Elizabeth L. Greenwood

7 Attorneys for Defendants

8 LOS ANGELES POLICE

9 DEPARTMENT, ALEX VARGAS,

10 JAVIER NAVARRO, JORGE

11 RODRIGUEZ, PETE

12 ECHAVARRIA, MICHAEL

13 BRAUSAM, DERRICK PRUDE,

14 DERRICK DOMINGUEZ, JASON

15 DE LA COVA, ANDRE VERGARA

16 JR., DONALD SCHWARTZER,

17 HORACE FRANK, KEVIN

18 MONTGOMERY, LARRY

19 GUILLEN AND RONALD CRUMP

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CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon & Rees LLP 633 West Fifth Street, 52nd Floor, Los Angeles, CA 90071. On May 23, 2014, I served the within documents:

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR HER
TO BE ALLOWED TO RECORD CONVERSATIONS WITH
DEFENSE COUNSELS WITHOUT THE CONSTANT THREAT OF
BEING PROSECUTED FOR A FELONY CRIME; DEFENDANTS'
REQUEST FOR SANCTIONS AGAINST PLAINTIFF IN THE
AMOUNT OF \$1,975**

Electronically: I caused a true and correct copy thereof to be electronically filed using the Court's Electronic Court Filing ("ECF") system.

10 I served those parties who are not registered participants of the ECF
System as indicated below.

11 by transmitting via facsimile the document(s) listed above to the fax
number(s) set forth below on this date before 5:00 p.m.

12 by personally delivering the document(s) listed above to the person(s) at
the address(es) set forth below.

13 by placing the document(s) listed above in a sealed envelope with postage
thereon fully prepaid, in United States mail in the State of California at
Los Angeles, addressed as set forth below.

14 by placing a true copy thereof enclosed in a sealed envelope, at a station
designated for collection and processing of envelopes and packages for
overnight delivery **by FedEx** as part of the ordinary business practices of
Gordon & Rees LLP described below, addressed as follows:

Via Fedex

Plaintiff In Pro Per
Nadine Hays
370 Highland Hills Drive
Camarillo, CA 93010
Telephone: (805) 484-4452
Facsimile: (818) 474-7676

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the Bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on **May 23, 2014**, at Los Angeles, California.

/s/ Carolina Rodriguez

Carolina Rodriguez